of the Soviet Government in 1918, although the Prime Minister [20] in 1919 had said: "The Bolshevist government has committed crimes against the allied subjects, and has made it impossible to recognize it even as a civilized government."

THE POWER OF A COURT OF EQUITY TO ORDER A NONRESIDENT DEFENDANT TO DO A POSITIVE ACT IN ANOTHER STATE. — The power of a court of equity acting *in personam* to order a positive act in another state has generally been denied [1] on two grounds: interference with the sovereignty of the other state [2] and inability to enforce the execution of its decree.[3] Interference with the sovereignty of the other state, however, is a circumstance appealing to the discretion of the chancellor rather than a bar to the jurisdiction, and although in a particular case it may be so great as to be ground for denying relief it should not be used as a solving phrase.[4] States do not exercise a "visitorial jurisdiction" over every private act affecting property within their territory.[5] Moreover, there is a strong social interest in this country where business has so little regard for state lines [6] not to make such state lines impassable barriers to the specific performance of an obligation to deliver property beyond the state border.[7] No court will willfully make a decree

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sale whether or not England had recognized the Soviet Government politically. This distinction is generally overlooked. See Pelzer *v.* United Dredging Co., reported N. Y. L. J., Feb. 9, 1922, P. 1659.

[20] Lloyd George, in the House of Commons, April 16, 1919.

[1] The effect of the general statement is somewhat limited by the fact that cases ordering positive acts in another state do occur in the books. Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541 (1908) (production of books before the grand jury); Vineyard Land Co. *v.* Twin Falls Co., 245 Fed. 9 (9th Circ., 1917) (protection of local property); Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625 (1902) (vacating a decree of a court in another state); Langford *v.* Langford, 5 L. J. Ch. [N. S.] 60 (1835) (receiver of Irish rents). But *cf.* Port Royal Ry. Co. *v.* Hammond, 58 Ga. 523 (1877). See Joseph H. Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 289, 292.

[2] The courts have stopped only at direct interference; indirect interference of all sorts is tolerated. Massie *v.* Watts, 6 Cranch (U. S.) 148 (1810) (specific performance: land in another state); Gardner *v.* Ogden, 22 N. Y. 327 (1860) (constructive trust: land in another state); Alexander *v.* Tolleston Club, 110 Ill. 65 (1884) (tort in another state). *Cf.* Mississippi R. Co. *v.* Ward, 2 Black (U. S.) 485 (1862 (no abatement of a nuisance in another state). See further KERR, INJUNCTIONS, 5 ed., 12.

[3] See 17 HARV. L. REV. 572.

[4] But see Joseph H. Beale, *supra*, at 292.

[5] A deed to land in another state executed under duress of the local court is valid at the *situs*. Gilliland *v.* Inabnit, 92 Iowa, 46, 60 N. W. 211 (1894).

[6] See Nichols & Shepard Co. *v.* Marshall, 108 Iowa, 518, 520, 79 N. W. 282 (1899).

[7] Other grounds tentatively suggested in support of the power of equity to order a positive act in another state are consent implied from considerations of mutual benefit, the fact of federal union, the relinquishment of many of the prerogatives of sovereignty by the states, and their community of interests. See 21 HARV. L. REV. 354, 355. The relinquishment of prerogatives to the federal government and the fact of federal union, however, would not extend the power of a sister state.

It has been stated as a matter of fact that the modern tendency is to attach less weight to interference with the sovereignty of another state. See 30 YALE L. J. 865. But it would seem that the courts are reluctant to interfere with property in a foreign country where there is no business justification for so doing. Matthaei *v.* Galitzin, L. R. 18 Eq. 346 (1873). See further, Joseph H. Beale, *supra*, at 292.

in known violation of the laws of another state. In other cases, it is submitted, the interests of the defendant are sufficiently protected by making the prohibition of the other state a defense to any proceedings to enforce or to punish for failure to obey the decree.[8] Such a rule would reduce interference with the sovereignty of the other state to a minimum and is an adequate safeguard to interstate relations.[9]

The second objection: inability to enforce the decree, gives greater pause. But here again although there may be insuperable difficulties to the enforcement of a decree calling for *certain* acts in another state it does not follow that a court of equity acting *in personam* can *never* effectively enforce a decree calling for an act in another state.[10] As against a defendant domiciled at the forum, personal jurisdiction may be obtained by constructive service [11] and — if the act abroad is performable by an agent [12] — the usual means of enforcement are available. The difficulties of enforcement are increased in the case of a nonresident defendant, but the matter is one of degree.[13] Once the defendant has been personally served within the territory, no matter how short his stay,[14] he is bound by all subsequent orders in the cause without further personal service.[15] His local property may be sequestered.[16] He might be forced to give a bond for performance.[17] A writ similar in nature to that of *ne exeat* might be provided by statute [18] against

[8] Impossibility of performance is a defense to contempt process. See RAPALJE, CONTEMPT, § 137. In case of doubt the court may require the plaintiff to execute a counterbond in favor of the defendant.

[9] The usual argument in support of the jurisdiction of a court of equity to grant specific performance of a contract to convey foreign land is that the deed is executed at the forum and that there is no act interfering with the foreign sovereign since whatever legal consequences attach to the deed do so by the law of the *situs*. See Joseph H. Beale, *supra*, at 293–294.

[10] The defendant may be forced to do all that he can legally do by the law of the *situs* to give effect to the decree. Phelps *v.* McDonald, 99 U. S. 298, 308 (1878).

[11] Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625 (1902).

[12] So far as is known, the courts uniformly refuse to issue a decree which will require the defendant to act abroad in person. See Waterhouse *v.* Stansfield, 10 Hare, 254 (1852). But see 30 YALE L. J. 865, suggesting that the defendant in such case might be forced to give a bond conditioned on the performance of the decree.

[13] Dunn *v.* M'Millen, 1 Bibb. (Ky.) 409 (1809); Ward *v.* Arredondo, Hopkins Ch. (N. Y.) 213 (1824); Cleveland *v.* Burrill, 25 Barb. (N. Y.) 532 (1857). *Contra*, Wicks *v.* Caruthers, 13 Lea (Tenn.) 353 (1884).

As a practical matter, unless the defendant was domiciled at the forum at the date of the decree it would seem immaterial — so far as enforcement goes — whether he was a nonresident from the beginning. Michigan Trust Co. *v.* Ferry, 228 U. S. 346 (1912) (money decree against an administrator who changed his domicil before the decree was rendered.) A distinction may be taken between a decree for a money payment and one for some other act, since the former may be sued on in an action of debt in another state. Sistare *v.* Sistare, 218 U. S. 1 (1909). But see Walter Wheeler Cook, "The Powers of Courts of Equity," 15 COL. L. REV. 228, 243. See Joseph H. Beale, *supra*, 193, 283.

[14] Darrah *v.* Watson, 36 Iowa, 116 (1873); Peabody *v.* Hamilton, 106 Mass. 217 (1870).

[15] Michigan Trust Co. *v.* Ferry, 228 U. S. 346 (1912); Dunn *v.* M'Millen, 1 Bibb. (Ky.) 409 (1809); Cleveland *v.* Burrill, 25 Barb. (N. Y.) 532 (1857); Matteson *v.* Scofield, 27 Wis. 671 (1871).

[16] Sequestration is available when the defendant cannot be found or is recalcitrant. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, p. 81.

[17] See 30 YALE L. J. 865.

[18] It might be questioned whether such a statute would be unconstitutional, as

his leaving the jurisdiction, and forfeiture of the equitable bail would not prevent his being punished for contempt if subsequently caught within the territory.[19] But neither his failure to perform [20] nor lack of actual power in the court to enforce the decree at the moment of its rendition [21] can affect its validity. Within the territory it remains a binding obligation and under the full faith and credit clause it may be set up as record evidence of the equities in any subsequent litigation in another state.[22]

A recent New York case,[23] in granting specific performance of a contract under aggravating circumstances, ordered the defendant, a resident of California who had been personally served with process in New York, to ship a thoroughbred stallion jointly owned by him and the plaintiff from California to the plaintiff's stock farm in Kentucky. To the objection that the plaintiff in the first instance should have applied to the court which could give practical effect to its decree,[24] it may be answered that as the New York court, after service of process, surrendered control over the defendant only out of regard for the "decencies of civilization," [25] so the defendant through corresponding decency should obey its decree without further coercion. The decree calling for a single definite act, the New York court could easily ascertain whether it had been obeyed. No hardship in procuring evidence presented itself. Further, if the obligation was to *deliver* the stallion in Kentucky,[26] a

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violating the privileges and immunities of the citizen; but the writ of *ne exeat* was known long before the adoption of the Constitution and is a reasonable method of enforcing a decree. Goodwin *v.* Clarke, 2 Dickens Eng. Ch. Rep. 497 (1774). New Jersey without the aid of special statute has extended the use of the writ to secure restraint on an habitual drunkard: *In re* Kearney, 21 N. J. L. J. 25 (1897); and to secure the custody of children: Palmer *v.* Palmer, 84 N. J. Eq. 550, 95 Atl. 241 (1915).

[19] The equitable bail is to secure the payment of the debt (or performance of the obligation). See 1 WHITEHOUSE, EQUITY PRACTICE, 1915 ed., § 433. The commitment for contempt is to vindicate the authority of the court. See Powell *v.* State, 48 Ala. 154, 156 (1872).

[20] Burnley *v.* Stevenson, 24 Ohio St. 474 (1875).

[21] It is submitted that the requirement of our law at the present day is potential rather than actual power of enforcement. Michigan Trust Co. *v.* Ferry, 228 U. S. 346 (1912). See 27 YALE L. J. 946, 948.

[22] The principle of *res judicata* has the same application in equity as at law. See 2 BLACK, JUDGMENTS, 2 ed., § 518. It is immaterial whether the second suit be in equity or at law. See 1 FREEMAN, JUDGMENTS, 4 ed., § 428.

Courts of other states have enforced the decree as a cause of action within their own jurisdiction. Roblin *v.* Long, 60 Howard Pr. (N. Y.) 200 (1880); Mallette *v.* Scheerer, 164 Wis. 415, 160 N. W. 182 (1916); Matson *v.* Matson, 186 Iowa, 607, 173 N. W. 127 (1919). *Contra*, Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676 (1894); Fall *v.* Fall, 75 Neb. 120, 113 N. W. 175 (1907), aff'd 215 U. S. 1 (1909). But see Walter Wheeler Cook, *supra*, 15 COL. L. REV. 228, 243.

As a defense: Burnley *v.* Stevenson, 24 Ohio St. 474 (1875); Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067 (1896).

A debt arising from an equitable decree is enforceable in another state by an action at law. Sistare *v.* Sistare, 218 U. S. 1 (1910).

[23] Madden *v.* Rosseter, 114 Misc. (N. Y.) 416, 187 N. Y. Supp. 462, aff'd 187 N. Y. Supp. 943 (App. Div.), 1921. For the facts of this case see RECENT CASES, *infra*, p. 617.

[24] Kimball *v.* St. Louis R. Co., 157 Mass. 7, 31 N. E. 697 (1892). See DICEY, CONFLICT OF LAWS, 2 ed., pp. 41–42.

[25] Michigan Trust Co. *v.* Ferry, *supra*, at 353, per Mr. Justice Holmes.

[26] The exact nature of the defendant's obligation does not clearly appear on the facts.

decree of the California court or of the Kentucky court would be just as objectionable as that of the New York court since either, to compel the defendant to do his full duty, would have to order an act in another state. It would seem, then, that inasmuch as the legal effect of the New York decree was primarily to establish a personal obligation [27] on the defendant there was nothing to be gained by refusing the plaintiff relief with the defendant properly before the court.

It is impossible to catalogue the cases in which relief should be granted and those in which it should be denied. Each case should be decided on its own facts in the light of all the circumstances.[28] The rights of third parties beyond the boundaries of the state should be given special consideration.[29] The local court, however, is not bound to give the same remedy as that which would be granted by the other state,[30] and relief need not necessarily be refused because of the possibility of a divergence of state law.[31] Assuming that an equitable decree is a final adjustment of the rights of the parties, possessing some of the elements of a judgment at law and not a mere process of execution,[32] contrary state policy [33] or mistake of foreign law [34] is no bar to full faith and credit in the United States.[35] The plaintiff should certainly be forced to show an extreme case, but when he has done so, it should affirmatively appear that the decree would interfere with the sovereignty of the other state or in and of itself be impossible to enforce before equitable relief should be denied him.[36]

RECENT CASES

ADMIRALTY — JURISDICTION — STATE PROCEEDINGS *IN REM* AGAINST FOREIGN VESSELS. —The plaintiff, at work on a dock, was injured when a

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[27] See William Barbour, "The Extra-Territorial Effect of the Equitable Decree," 17 MICH. L. REV. 527, 548–550.

[28] "The development of equity in England was obtained by a method of seeking results in concrete causes." See Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605, 611.

[29] Harris *v.* Pullman, 84 Ill. 20 (1876). See the explanation of the decision in Fall *v.* Fall, *supra*, by Mr. Justice Holmes in Fall *v.* Eastin, 215 U. S. 1, 15 (1909).

[30] See 25 HARV. L. REV. 653.

[31] But equity in its discretion may refuse to issue a decree which will leave the party in peril of a conflicting decree in another state. Harris *v.* Pullman, *supra*, at 27.

[32] See Walter Wheeler Cook, *supra*, 15 COL. L. REV. 228, 243; W. N. Hohfeld, "The Relations Between Law and Equity," 11 MICH. L. REV. 537, 551; William Barbour, *supra*, 17 MICH. L. REV. 527. See 26 YALE L. J. 331. See HUSTON, ENFORCEMENT OF DECREES IN EQUITY, pp. 151–153. *Cf.* 25 HARV. L. REV. 653. See also the cases cited under note 22, *supra*, especially Matson *v.* Matson and Bullock *v.* Bullock.

[33] Kenney *v.* Supreme Lodge, 252 U. S. 411 (1920).

[34] Fauntleroy *v.* Lum, 210 U. S. 230 (1908).

[35] See 22 HARV. L. REV. 51.

[36] A New York receiver was also appointed with power to proceed to California to get the stallion. It would seem that such appointment has no effect *in rem*, but the query has been raised as to the substantial difference between the act of the defendant under duress of the court and the decree of the court itself. See Fall *v.* Eastin, 215 U. S. 1, 10 (1909). See also Walter Wheeler Cook, *supra*, at 129. Such a question, however, is beyond the scope of the present note.

As to the effect of the appointment of a receiver over property in another state, see 1 CLARK, RECEIVERS, §§ 57, 483.